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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEE ALFRED, Defendant and Appellant.	B242599 (Los Angeles County Super. Ct. No. BA384265)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Elliott Veals, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Paul M. Roadarmel, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Christopher Lee Alfred appeals from the judgment of conviction following a jury trial in which he was convicted of four felonies: Criminal threats (Pen. Code, § 422)[1] (counts 1 & 2); first degree burglary (§ 459) (count 3); and threatening a witness) (§ 140, subd. (a)) (count 4). As to all counts, the jury found true the gang enhancement (§ 186.22, subd. (b)(1)). As to count 3, the jury also found true the allegation that another person other than an accomplice was present in the residence during the burglary (§ 667.5, subd. (c)). In a bifurcated proceeding, the trial court found true the allegations that appellant had suffered one prior "strike" conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and one prior serious felony conviction (§ 667, subd. (a)).

The trial court sentenced appellant to a total of 23 years in state prison as follows: On count 3, the base term, the court selected the midterm of four years doubled to eight years for a second strike; plus five years for a prior serious felony conviction; plus 10 years for the gang enhancement. The court stayed the two-year midterm sentences on counts 1 and 2 and the three-year midterm sentence on count 4.

Appellant contends there was no substantial evidence to support his conviction for criminal threats against one of the victims (count 1) and that the trial court erred in failing to sua sponte instruct the jury on the lesser included offense of attempted criminal threats. We disagree and affirm.

FACTS

Prosecution Case

In July 2008, Shavin "Corky" Walzer (Walzer), a member of the Schoolyard Crips gang, hit James Kyles (Kyles) in the face and robbed him. On September 23, 2008, Kyles testified for the prosecution and against Walzer at a preliminary hearing.

At the end of April 2011, appellant, whom Kyles knew to be a member of the Schoolyard Crips, told Kyles there was a "bounty" on his head for testifying against

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Walzer. Kyles thought this meant he would be "beat up [or] hurt in some kind of way," and he was afraid. Kyles "knew it was serious" and took it as a "warning."

Kyles shared a large house with his "common law wife," Susan Burns (Burns), in the Schoolyard Crips' territory. Among the people who lived in the house was Charles Dutton (Dutton), a member of the Schoolyard Crips. Other members of the gang would drop by to see Dutton, including appellant.

On May 5, 2011, at about 11:30 p.m., Kyles was at home sitting on a sofa with friends Diamond and Michelle. Burns was upstairs. There was a knock on the door and Burns went downstairs to answer. When she asked who was there, a person replied "Screwy." Screwy's real name is James Crittendon (Crittendon) and he is also a member of the Schoolyard Crips. Burns peered behind the curtains and asked Crittendon if he was alone. He answered, "Yes, I am. Just me. I have a 40-ounce bottle of beer[.]" He said he was looking for Dutton. Burns opened the door and said, "Hurry up and come inside because there's certain people I don't want in my house." Crittendon held his backpack in front of him and walked slowly into the house. Appellant, who had been hiding behind him, followed him inside.

Once inside, appellant yelled at Burns, called her a "bitch," and said, "Schoolyard. This is not your house. If I want to come in here, I can come in whenever I want to." He asked her, "Do you have a problem with me? You don't want certain people in your house? Are you showing favoritism?" He also said, "You have to respect me. I will burn this. You want me to burn this mother fucker down[?]" Appellant's fists were clenched and he was standing as if to punch her. He then asked, "You don't want me to knock your teeth down your throat, do you?" Burns was afraid appellant would carry out his threat and ran upstairs. As she put on a robe, she heard appellant yelling downstairs.

Burns returned downstairs and saw appellant standing over Kyles, who was still seated on the sofa. With clenched fists, appellant shouted at Kyles, "You need to stand up and be a man in your house. And the next time I come to this house and hear of you disrespecting any of the homeys in this neighborhood, drunk or sober, I'm going to knock your fucking teeth down your throat. Do you want me to knock your fucking teeth down

your throat, too?" Appellant said, "Schoolyard[,] I'll knock your teeth out of your throat on Schoolyard Crip for putting one of my homeboys in jail." Kyles was afraid that appellant could "hurt" or "kill" him, and was afraid to get up from the sofa. Appellant continued shouting, "You put my home boy Corky in jail. He told me to knock your teeth out down your throat a long time ago." Appellant also told Kyles, "I will kill your ass[.]" Kyles testified that he was afraid appellant was about to hurt him. Kyles later testified on cross-examination following a weekend recess that after appellant threatened to knock Kyles's teeth out, appellant said he "wouldn't do what he wanted to do," and Kyles understood this to mean that nothing would happen at that time

Burns went across the street and called the police, who arrested appellant. After the police left, Diamond punched Kyles in the nose, drawing blood. Diamond said that appellant told him to "sock that mother fucker because he's going to call the cops on me[.]"

About one and a half months before trial in this matter, Walzer came to the house, stared silently at Kyles "for five minutes," and went inside. Kyles told Burns to call the police; instead, she asked Walzer to leave and he complied. The incident scared Burns and she left a voice mail for the investigating officer. Crittendon also came by the same month and threatened Burns.

Los Angeles Police Department (LAPD) Officer John Maloney testified as a gang expert. He was familiar with the Schoolyard Crips, which has around 200 members. The gang's primary activities are murder, attempted murder, residential burglary, robbery, narcotic sales, vandalism, and graffiti. Appellant is a self-admitted member of the Schoolyard Crips with the gang moniker "C Crazy" and has numerous gang tattoos. When asked a hypothetical question based on the evidence presented at trial, Officer Maloney opined that the threats were made for the benefit of, at the direction of, and in association with the Schoolyard Crips as a means of instilling fear, and would promote and assist the gang by deterring residents from reporting crimes committed by gang members.

Defense Case

Appellant called two LAPD officers. Officer Edgar Bacilio testified that he went to the scene in response to the call made by Burns. Kyles told him that appellant pushed Burns to the ground when he entered their house. Kyles also recounted that when appellant confronted him, Burns tried to intervene and was again pushed to the ground. On cross-examination, Officer Bacilio testified that as he talked to Kyles about the incident, Kyles "was trembling. He seemed to be in fear. And at times, he would – his voice would change." Officer Bacilio thought Kyles "almost . . . wanted to cry."

Officer Nestor Escobar, who also responded to the scene, testified that Burns told him appellant pushed her to the ground; she also said that appellant told Kyles he would kill him. On cross-examination, Officer Escobar testified that Kyles told him he believed the threat was made in retaliation for "his testimony against another Schoolyard Crip some years back," and that Kyles appeared scared.

DISCUSSION

I. Standard of Review

When determining whether the evidence is sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the entire record in the light most favorable to the judgment to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Ibid*.) We presume in support of the judgment the existence of every fact that a trier of fact could reasonably deduce from the evidence. (*Ibid*.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Even when there is a significant amount of countervailing evidence, the testimony of a single witness can be sufficient to uphold a conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) So long as the circumstances reasonably justify the trier of fact's finding, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding

does not warrant reversal of the judgment. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

II. Substantial Evidence Supports Appellant's Conviction for Criminal Threats in Count 1

While appellant concedes that he "certainly did something wrong on May 5, 2011," he argues that his actions, and Kyles's reaction to them, do not constitute substantial evidence to support a conviction for criminal threats in count 1. We disagree.

A. *Applicable Law*

To prove a violation of section 422, the prosecution must establish all of the following: "(1) that the defendant 'willfully threatened to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was "reasonable' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.) The jury was so instructed. (CALJIC No. 9.94.)

"To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific. The statute includes the qualifier 'so' unequivocal, etc., which establishes that the test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose

and immediate prospect of execution. [Citation.]" (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.) "Even an ambiguous statement may be a basis for a violation of section 422." (*People v. Butler* (2000) 85 Cal.App.4th 745, 753.) In deciding whether a communication constitutes a threat, the court considers the communication on its face and in the context of its surrounding circumstances. (*People v. Bolin, supra,* 18 Cal.4th at pp. 339–340; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [parties' history can be considered as one of the relevant circumstances]; see also *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431–1432 [threat followed lengthy history of threatening and physically assaulting victim]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014 [threat may be interpreted in light of defendant's subsequent conduct].) The language of the threat does not have to include details about the time or precise manner of execution. (*People v. Butler, supra,* 85 Cal.App.4th at p. 752.)

A victim must actually be in sustained fear, and the sustained fear must be reasonable under the circumstances. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140.) Although neither section 422 nor case law has fixed the length of time required for a finding of "sustained" fear, it has been described as "a period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; see also *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349 [holding that element of sustained fear was met during a one-minute incident where the victim heard the threat and saw the defendant's weapon].)

B. *Substantial Evidence*

Appellant's argument that the evidence was insufficient to sustain his conviction for criminally threatening Kyles focuses exclusively on Kyles's isolated testimony on cross-examination that appellant stated he "wouldn't do what he wanted to do" after threatening to knock out Kyles's teeth and that Kyles understood this statement to mean that appellant was not going to hurt him at that time. According to appellant, this testimony shows that "Kyles therefore did not experience sustained fear from this threat."

But appellant ignores the remaining evidence. (See *People v. Johnson* (1980) 26 Cal.3d 557, 577 ["'we must resolve the issue in the light of the *whole record* . . . and may

not limit our appraisal to isolated bits of evidence'"].) The jury also heard that shortly before appellant's threat on May 5, 2011, appellant told Kyles there was a "bounty" on him for testifying against another member of appellant's gang. Kyles thought this meant he would be harmed in some way, and he was afraid. On the night of May 5, 2011, appellant forced his way inside Kyles's house and called Kyles's wife a "bitch" and threatened to knock her teeth down her throat. After she fled upstairs, appellant turned his attention to Kyles. Appellant stood over Kyles, who was seated, and shouted at him with clenched fists, threatening to knock out his teeth "for putting one of [appellant's] homeboys in jail." Kyles testified that appellant also threatened to "kill [Kyles's] ass." Kyles repeatedly testified on direct examination that he was afraid and took appellant's threats seriously. As appellant left the house, he told Kyles's friend Diamond to "sock that mother fucker because he's going to call the cops on me," and Diamond complied.

Two police officers who responded to the scene found Kyles trembling and scared. Officer Bacilio thought Kyles almost wanted to cry, and Officer Escobar testified that Kyles told him he believed the threat was made in retaliation for "his testimony against another Schoolyard Crip some years back." Gang expert Officer Maloney explained the culture of gangs and the emphasis gang members place on retaliation and respect. Additionally, Kyles testified that he was "still scared today" of appellant.

Appellant's argument essentially amounts to a request that we reweigh the evidence and the credibility of witnesses. We are not permitted to do so. (*People v. Maury, supra,* 30 Cal.4th at p. 403 [appellate courts resolve "neither credibility issues nor evidentiary conflicts"].) Rather, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra*, 26 Cal.3d at p. 578.) Under the circumstances here, we are convinced that substantial evidence supports the jury's verdict on count 1.

III. No Error in Failing to Instruct on Lesser Included Offense of Attempted Criminal Threat

Appellant contends the trial court committed reversible error in failing to sua sponte instruct the jury on the lesser included offense of attempted criminal threat. We disagree.

Attempted criminal threat is a lesser included offense of the crime of criminal threat. (*People v. Toledo, supra*, 26 Cal.4th at p. 230.) The duty to instruct on a lesser included offense arises "'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Barton* (1995) 12 Cal.4th 186, 194–195.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, . . ." (*People v. Breverman* (1998) 19 Cal.4th 142, 162; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1218; *People v. Memro* (1995) 11 Cal.4th 786, 871.) Thus, when there is no evidence that the offense committed was less than that charged, there is no duty to instruct on lesser included offenses. (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) We review de novo an alleged failure by a trial court to instruct on a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Appellant argues that the jury should have been instructed on the lesser included offense of attempted criminal threat because "there are questions as to the sufficiency of the evidence as [to] the element of sustained fear in count one." Because we are convinced that there was substantial evidence to support the jury's guilty verdict on the completed offense of criminal threat, the trial court did not err in failing to instruct on the lesser charge.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ